IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

Appeal No. 95, 96/2021

BETWEEN:

HENRY MBEWE — **1ST APPELLANT**

SAMSON BANDA — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

CORAM: Makungu, Sichinga and Muzenga JJA
On 15th February, 2022 and 21st February, 2023

For the Appellants: Mrs. L. Z. Musonda, Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. P. Nyangu, Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA, JA, delivered the Judgment of the Court.

Cases referred to:

1. **Esther Mwiinde v The People (1986) ZR 15 (SC)**
2. **Chiyovu Kasumu v The People (1978) ZR 252**

3. **Latins Lungu v The People – SCZ Appeal No. 35 of 2018**
4. **Boardman v The DPP (1974) 3 ALL ER**
5. **Daniel Mubita Situmbeko v The People (1977) ZR 133**
6. **Munyinya v The People (1969) ZR 29**
7. **Humphrey Daka v The People – SCZ Appeal No. 19 of 2016**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 Henry Mbewe and Samson Banda (the appellants herein) were jointly charged with 6 others in the first count with the offence of aggravated robbery contrary to **Section 294(1) of the Penal Code[1].** The appellants admitted the offence under count one, were convicted and sentenced to 15 years imprisonment with hard labour. The six (6) others were discharged after a *nolle prosequi* was entered in their favour.

1.2 In count two, the appellants were charged with the offence of aggravated robbery contrary to **Section 294(1) of the Penal Code[1].** It was alleged in the particulars of the offence that the appellants, on 3rd April, 2019 at Petauke District of the Eastern Province of the Republic of Zambia jointly and whilst acting together did steal from

Raphael Mwanza 1 motor vehicle namely Toyota Corolla Registration Number ALD 4694 and one D-horse phone all valued at K35,120.00, the property of Raphael Mwanza and at or immediately before or immediately after the time of such stealing, did use or threaten to use actual violence to Raphael Mwanza in order to obtain or retain or prevent or overcome resistance to the property being stolen or retained.

1.3 In count three, the appellants herein were charged with murder contrary to **Section 200 of the Penal Code[1].** It was alleged in the particulars of the offence that the appellants on the 3rd of April, 2019 at Petauke in the Petauke District of the Eastern Province of the Republic of Zambia, Jointly and whilst acting together did murder Raphael Mwanza.

1.4 They were subsequently convicted and sentenced to 30 years imprisonment for count two and death for count three by the High Court (before Mr. Justice W. G. K. Muma).

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

2.1 The appellants' conviction hinged on the evidence of five prosecution witnesses. A summary of the evidence of Dickson Phiri PW1 was that

in the early hours of 31st April, 2019 he was awakened by the police who came to enquire why his vehicle Registration Number ALD 4694 was by the roadside stained with blood. He told the police that his car was in the custody of the driver/mechanic named Raphael Mwanza. The police requested for the driver's phone number which he gave them. They tried calling the number but it was unreachable.

2.2 He testified that he accompanied the police to retrieve the car and indeed he found that it was his and that it had blood stains on the driver's door and the rear seat. He also noticed that the tyres were deflated and the front screen damaged.

2.3 A summary of the evidence of Chawanzi Sakala, PW2 an employee at Atoti Night Club was that on 3rd April, 2019 while on duty he was approached by the appellants who were looking for a taxi. He negotiated a cheap fare for them with the driver of a Grey Toyota Corolla taxi which was outside the club. After the two left in the taxi, he went back inside the nightclub.

2.4 He told the trial court that the following day, when he learnt that a taxi driver had been killed after his motor vehicle was booked at Atoti Night Club, he approached his boss and narrated to him how he had booked

a motor vehicle for the appellants and that a driver had been killed in the same direction where the appellants went. In the company of his boss he went to the police station where he narrated what transpired the previous night. He later led the police to Samson Banda's house but they did not find him. He narrated that thereafter, he led the police to Kazolwe where Henry (the 1st appellant) lived and they found Henry's wife.

2.5 When cross-examined, he confirmed that he went to search for a taxi for the appellants around mid-night.

2.6 Mwezi Banda, the Chairlady of the Section was the third prosecution witness (PW3). A summary of her testimony was that on 3rd April, 2019 as she was asleep at night, she heard some voices and when she went outside she found Ackson Mwanza who told her that he was chasing a thief. That she and Ackson Mwanza managed to apprehend the thief. She asked Ackson to take the thief to the police station and while in the process of securing the thief, she heard someone shouting out for help. They called for reinforcement and went to search for the person who was shouting for help. In the nearby place, they found a

car with a broken front windscreen that had blood on the driver's seat with a chain hanging on the seat.

2.7 The fourth prosecution witness was Patrick Zulu a close friend of the deceased. His testimony was that he was called to the police station to identify Raphael Mwanza the deceased and his personal belongings which were recovered from the crime scene.

2.8 The last prosecution witness was Humphrey Misale the arresting officer. He told the court that in the early hours of 3rd April, 2019, he received a phone call from PW3, informing him that there was an abandoned vehicle at Riverside Compound and that the driver seemed to have died.

2.9 In the company of other police officers, PW5 rushed to the scene and they found an abandoned car. He observed that the motor vehicle was silver in colour and was registered with a number plate ALD 4694. He also observed that the driver's seat, as well as the back passengers' seats, were stained with blood. He testified that he checked the motor vehicle and found some documents which had a mobile number on them. He called the said number, and it turned out that PW1 the owner of the vehicle answered.

2.10 He stated that PW1 told him that the vehicle was with his driver Raphael Mwanza. They started searching for the driver and around 06:00 hours they found his body in a shallow pond. An inspection of the body revealed that the deceased had sustained a deep cut on the left side of his neck and another deep cut on his right palm. The body was deposited at Petauke District Hospital mortuary pending a post-mortem examination.

2.11 It was PW5's further testimony that he went on to lift fingerprints from the crime scene and the motor vehicle was taken to Petauke Police Station. PW1 gave a statement to the police and valued his vehicle at K35,000.00.

2.12 On 5th April, 2019, a post-mortem examination was conducted and the report indicated that the deceased sustained a deep cut on his cheek, right hand and neck. He further sustained a rapture of the right internal and external jugular vein which caused his death.

2.13 Armed with the information from PW2 and PW3, a manhunt for the appellants commenced. The second appellant was apprehended whilst asleep in his house. His house was searched and the police recovered one green camouflage windbreaker jacket, one black windbreaker

jacket, and two knives all stained with blood. PW5 told the trial court that the second appellant led the police to Chenjelani Village where the first appellant was apprehended. They recovered from his house a D-Horse phone, a modulator and a tracksuit stained with blood. All recovered items were taken to Petauke Police Station where they were subsequently identified by PW4 a close friend of the deceased.

2.14 This marked the end of the prosecution case. The appellants were found with a case to answer and accordingly put on their defence. Both appellants elected to give evidence on oath and the first appellant called a witness.

3.0 THE DEFENCE

3.1 In his defence, the first appellant informed the trial court that on 5th April, 2019 around 10:00 hours, six police officers went to his home and asked him if he was Henry Mbewe which he answered in the affirmative. The police officer asked him where he slept and they started searching his house. He told the trial court that the police did not recover anything from his house. He was then taken to the police car where he found the second appellant and they were informed that the police were investigating the death of Raphael Mwanza. He denied

knowing anything about the death of Raphael Mwanza. He also denied having been at Atoti Night Club on the material night and further denied that anyone booked a taxi for him.

3.2 Under cross-examination, he denied that PW2 found a taxi for him.

3.3 The second defence witness was Joseph Mbewe the father of the first appellant. A summary of his testimony was that he was present on the day the police officers arrested his son and that the police did not recover anything from his son's house.

3.4 In his defence, the second appellant told the trial court that on 4th April, 2019 when he knocked off from school, he decided to go and buy two goats. He stated that on this particular day, he wore a black T-shirt, a white tracksuit bottom with red strings on the waist and a camouflaged windbreaker jacket. It was his testimony that after buying the goats, he decided to slaughter them and in the process, blood splashed on him and when he got home in the evening, he put the clothes he wore under his bed.

3.5 In his continued testimony, he narrated that the following day, around 01:00 am the police searched his house and recovered the clothes he

was wearing, arrested him and took him to Petauke Police Station. He denied having anything to do with the death of Raphael Mwanza.

3.6 In cross-examination, the second appellant maintained that the clothes in question were his and that he did not know anything about the death of Raphael Mwanza.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 After careful consideration of the evidence before him, the learned trial judge found that it was not in dispute that the appellants did book the deceased to take them to Riverside in Petauke. The trial court further found that the appellants used an offensive weapon namely a chain and a knife to inflict injury to the deceased in order to obtain the items stolen. The court went on to observe that the chain and knife had blood stains when they were retrieved from the appellants' homes. He also found that the crime happened on the motor vehicle as evidenced by the blood stains in the vehicle and that there was no direct evidence adduced by the prosecution of how the offence was committed. The court also found that there being evidence that the items belonging to the deceased, namely the camouflage jacket, the modulator and the phone which the deceased had immediately prior to the fateful night,

were found in the custody of the appellants proves that the appellants were with the deceased that night.

4.2 The trial judge stated that from the foregoing, he was convinced that the appellants jointly and whilst acting together did steal from the deceased 1 motor vehicle, namely a Toyota Corolla Registration Number ALD 4694, a D-Horse phone and a modulator and that they used actual violence on the deceased in order to obtain or prevent resistance to the property being stolen or retained. The court further found that in the process of stealing from the deceased, the appellants attacked him and inflicted serious injuries namely a deep cut on his cheek, right hand and neck. He further sustained a rapture of the right internal and external jugular vein which caused his death. That the fact that the appellants had knives and a chain shows that they had the malice aforethought of causing grievous bodily harm to the deceased.

4.3 The court further noted that the particulars of the offence in the count to which they pleaded guilty are similar to the particulars in count two whereby they booked a taxi at night to take them to Chenjelani Village and on their way, they removed a chain and hooked the driver on the

neck while Henry Mbewe stabbed the driver with a knife. The driver got a screwdriver and stabbed Samson Banda in the neck and that is how he managed to stop the vehicle before jumping out.

4.4 The matter was reported to the police and the motor vehicle was later recovered abandoned at Chiwowo Village after running out of fuel. The court stated that this clearly demonstrates how the appellants attempted to take the life of a taxi driver in a similar fashion just a day after they gruesomely murdered Raphael Mwanza.

4.5 Relying on the overwhelming evidence and the principle laid down in the case of **Esther Mwiinde v The People,**[1] the trial judge stated that the prosecution had proved its case against the appellants in both counts.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with both conviction and sentence, the appellants appealed to this Court on one ground of appeal as follows:

(1) The learned trial court erred in law and fact when he, in the absence of proof beyond all reasonable doubt, found that it was clear that the appellants used an offensive weapon namely a chain and a knife, to inflict injury on Raphael Mwanza in order to obtain the items stolen and convicted them for the offence of aggravated robbery and murder.

6.0 APPELLANTS ARGUMENTS

6.1 In support of the sole ground of the appeal, the learned counsel for the appellants contended that while the trial judge found on page 180 of the record of appeal that the chain was retrieved from the appellant's home, the prosecution evidence on the record indicates that the chain was found in the car at the crime scene. It was the counsel's contention that there is no evidence on record to indicate whether fingerprints were uplifted from the chain. It was counsel's contention that there is no evidence placing the appellants on the scene.

6.2 It was contended that this matter was not thoroughly investigated and the dereliction of duty herein goes to the core of the prosecution's case and brings to the fore the presumption that the evidence, which was not obtained, would have been favourable to the appellants'. To this end, we were referred to the case of **Chiyovu Kasumu v The People.**[2] Counsel contended that the prosecution's further failure in their duty to submit the recovered items for forensic examination on whether the blood on them was human blood or goat blood, resulted in the trial judge making assumptions which were not supported by

the evidence on record. We were referred to the case of **Latins Lungu v The People**[3] in which the Supreme Court stated that:

> **"We take the view that the investigations offered in this matter took a casual approach and looked at this case as an open-shut which is most regrettable. Such an attitude can lead to an innocent person being convicted or a guilty person can escape the long arm of the law . . . due to the gaps in the evidence, the learned trial judge ended up making assumptions which assumptions were not supported by the evidence on record . . . Clearly, the evidence on record raised strong suspicion of the possibility of foul play. However, strong suspicion is not the standard of proof in criminal matters."**

6.3 Counsel went on to submit that the prosecution did not execute its constitutional duty to guarantee a fair trial to the appellants. That the record of proceedings is silent on the outcome of the investigations which were conducted regarding the thief who was apprehended by PW3 and Mr. Ackson Mwanza. It is submitted that this creates another inference that the deceased could have been murdered by the thief acting together with other people PW3 saw running away. In summation counsel submitted that the circumstantial evidence on record did not take the case out of the realm of conjecture so that it

attained such a degree of cogency which can only permit an inference of guilt.

6.4 We were urged to allow the appeal, quash the convictions and set aside the sentences and set the appellants at liberty.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, learned counsel in responding to the sole ground of appeal, argued that the trial court was on firm ground when it convicted the appellants for the offence of aggravated robbery contrary to **Section 294(1)** of the **Penal Code** as the prosecution adduced overwhelming evidence proving beyond reasonable doubt that the appellants jointly and whilst acting together did use offensive weapons namely; a knife and a chain to inflict injury on Raphael Mwanza, in order to steal a motor vehicle namely Toyota Corolla Registration Number 4684 from him.

7.2 It was counsel's further submission that she agrees with the trial court's decision to consider the past conduct of the appellants in count 1, in arriving at the decision to convict the appellants of the offences committed in counts two and three. We were referred to the case of **Boardman v The DPP**[4] wherein the House of Lords held that:

"In exceptional cases evidence that the accused had been guilty of other offences was admissible if it showed that those offences shared with the offence which was the subject of the charge, common features of such unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence."

7.3 Counsel submitted that in cases such as this, the judge had the discretion to admit the evidence if he was satisfied that its probative force in relation to an issue in the trial outweighs its prejudicial effect. In summation, it was contended that the trial court correctly exercised its discretion to admit the facts of a previous conviction of the offence of aggravated robbery in count one as similar facts evidence to the facts subject of the appeal. That the evidential value of the previous aggravated robbery clearly outweighed its prejudicial effect. We were thus urged to dismiss the appeal.

7.0 THE HEARING

7.1 At the hearing of this appeal on 17th February, 2022, both learned counsel for the appellant Ms. Musonda and learned counsel for the respondent Ms. Nyangu relied on the filed heads of arguments.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have carefully considered the evidence on record, the arguments by the parties and the judgment under attack. We are grateful to counsel for their arguments.

8.2 The pre-emptory issue in this appeal is whether or not it was proper for the trial court to rely on the conviction in count one in convicting the appellants for the other counts.

8.3 The appellants were facing a total of three counts, the first two for aggravated robbery and the third one for murder. When they appeared for plea in the court below, they pleaded guilty to the aggravated robbery in count one, facts were prepared which were duly admitted, they were convicted and sentenced to fifteen (15) years imprisonment. The trial court then proceeded to hear the matter in respect of counts two and three.

8.4 In our jurisdiction, a trial court should not be made aware of a prior conviction, before or during a subsisting trial. This is in order to avoid prejudice against the accused person. **Section 157(vi)** of the **Criminal Procedure Code, Chapter 88 of the Laws of**

Zambia even prohibits cross-examining an accused person on his or her previous convictions.

8.5 Sakala, J, as he then was, held in the case of **Daniel Mubita Situmbeko v The People**[5] that:

> **"It is a serious irregularity and fatal to the prosecution case to inform the court of the previous convictions of an accused person before the commencement of the trial."**

8.6 Further, Evans, J, as he then was, stated in the case of **Munyinya v The People**[6] that:

> **"When a magistrate knows that the accused has a criminal record, he must, before trial, inform the accused of this knowledge, take note of any objections by the accused to being tried under these circumstances, and then decide whether to recuse himself."**

8.7 What is abundantly clear is that a trial court should not be privy to any previous or subsisting conviction of an accused person during the life of a current trial. Where a court is aware of such information, the issue is whether the trial court was influenced in reaching its current decision by such knowledge.

8.8 The Supreme Court in the case of **Humphrey Daka v The People**[7] had this to say at page J11; where a previous conviction was brought to the attention of the trial court during the life of the trial:

> **"It is not in dispute that the prosecution in cross examination of the appellant did ask him questions relating to a previous offence for which he was convicted by the High Court on the 28th April, 2014 and sentenced to death. We agree with Mr. Muzenga that according to the provisions of Section 157(vi) the appellant ought not to have been asked questions on that conviction. What is of prime importance, however, is whether the trial court was influenced by those questions in arriving at its decision."**

8.9 The Supreme Court went on to conclude at page J12 that:

> **"In our view, such a meticulous approach to resolving a contested issue cannot be undertaken by a court that is biased. The view we take, therefore, is that the trial court arrived at its conviction via an unbiased approach and, therefore, its sentiments about the appellant's defence, though unfortunate, were not evidence of any bias that may have arisen from the disclosure of the appellant's previous conviction during trial."**

8.10 The question therefore is whether the court below was influenced by the conviction in count one when convicting the appellants for counts two and three. There is no doubt that the trial court was heavily influenced by the facts relating to count one. This is what the trial court said before reproducing the statement of facts for count one at page J16 of the judgment:

> **"I shall not gloss over the facts in count 1 herein to which the two accused persons before me pleaded guilty to, and were sentenced. The facts are strikingly similar to the evidence available before me, and I wish to recap."**

8.11 A perusal of the trial court's judgment does not show a meticulous analysis of the prosecution witnesses' evidence and that of the appellants', neither does it show which version the trial court believed and the reasons for doing so. The first appellant stated in his defence that when the police came, they recovered nothing from his house and he even called a witness in aid of his defence, who confirmed his account. The second appellant explained the blood stained clothes recovered from his home. He claimed ownership of the clothes and explained how the blood stains came

to be on the clothes. On the other hand, PW4 claimed that the clothes belonged to the deceased. In these circumstances, it was necessary that a thorough analysis of the evidence and findings be made and the basis for believing one witness over the other clearly noted.

8.12 It will be noted that the trial court in looking at the evidence against the appellants, was making sweeping statements as though the appellants lived in the same house or that all the pieces of evidence were recovered from both of them, and yet the evidence was clear from whom the distinct items were recovered as per PW5's evidence. This was a misdirection.

8.13 To crown it all, the trial court at page J18 stated that:

> **"As I said earlier, the evidence adduced and the facts upon which the two accused persons got convicted clearly demonstrates that the two accused persons before me engaged themselves in this enormity and this cannot be deemed as mere coincidence."**

8.14 We have thus come to a firm conclusion that the trial court was greatly influenced in convicting the appellants in *casu,* by the conviction in count one. The appellants therefore can be said not

to have had a fair trial. We thus quash the convictions and sentences imposed by the trial court in counts two and three.

8.15 We agree with the decision of Evans, J in the **Munyinya case** *supra* that when a trial court, prior to hearing the matter or in the course of a trial comes to learn that the accused has a previous conviction, the court should note the same on the record and enquire from the accused person if he or she is willing to allow the court to continue hearing the matter. The accused person's response must carefully be written on the record. Otherwise, the most prudent thing to do, is to have the matter re-allocated to another judge in order to guarantee a fair trial.

8.16 In the situation the trial court found itself herein, it would have been prudent for it, after the plea of guilty in count one, not to proceed any further with it until the conclusion of the trial in respect of counts two and three. This would have ensured some semblance of a fair trial as the court would not have been privy to the facts. Having proceeded in the manner that the trial court did, it should have let counts two and three be tried by another court.

9.0 CONCLUSON

9.1 Having allowed the appeal as aforesaid, we have considered the circumstances and we are satisfied that a retrial would be more appropriate. We thus send the matter back to the High Court for retrial before another judge.

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C. K. MAKUNGU

COURT OF APPEAL JUDGE

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D. L. Y. SICHINGA, SC

COURT OF APPEAL JUDGE

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K. MUZENGA

COURT OF APPEAL JUDGE